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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

USA COMMERCIAL MORTGAGE
COMPANY,

USA CAPITAL REALTY ADVISORS, LLC,

USA CAPITAL DIVERSIFIED TRUST DEED
FUND, LLC,

USA CAPITAL FIRST TRUST DEED FUND,
LLC,

USA SECURITIES, LLC,

Debtors,

Affects:

- ☐ All Debtors
- ☒ USA Commercial Mortgage Company
- ☐ USA Capital Realty Advisors, LLC
- ☐ USA Capital Diversified Trust Deed Fund, LLC
- ☐ USA Capital First Trust Deed Fund, LLC
- ☐ USA Securities, LLC

Case No. BK-S-06-10725-LBR
Case No. BK-S-06-10726-LBR
Case No. BK-S-06-10727-LBR
Case No. BK-S-06-10728-LBR
Case No. BK-S-06-10729-LBR

CHAPTER 11

Jointly Administered Under Case
No. BK-S-06-10725-LBR

Judge Linda B. Riegle Presiding

**USACM LIQUIDATING TRUST'S
MOTION FOR SUMMARY JUDGMENT
TO CLASSIFY CLAIM BY PECOS
PROFESSIONAL PARK LIMITED
PARTNERSHIP IN PLAN CLASS A-7**

USACM Liquidating Trust ("USACM Trust") moves for summary judgment on its Motion to Classify Claims Filed by Pecos Professional Park Limited Partnership ("Pecos") in Plan Class A-7 [DE 3081] (the "Objection"). Pecos asserts an unsecured claim (Claim No. 751-2) arising out of the alleged breach of an unexpired lease by USACM ("Pecos Claim"). Under the confirmed Third Amended Joint Chapter 11 Plan of Reorganization ("Plan"), the Pecos Claim is subject to treatment in Class A-7 as a Subordinated Claim because Pecos is a "Non-Debtor Insider" as defined by the Plan. This Motion is supported

1 by the Court’s record, the following Memorandum of Points and Authorities, and the
2 Statement of Facts filed simultaneously in support of the Motion (“SOF”).

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. JURISDICTION**

5 The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 1334 and 157.
6 Venue is appropriate under 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding
7 under 28 U.S.C. § 157(b)(2)(B). The statutory predicate for the relief requested herein are
8 11 U.S.C. §§ 502, 510(c), 1142 and Bankruptcy Rule 3007.

9 **II. UNDISPUTED FACTS**

10 **A. The Plan**

11 On January 8, 2007, the Court entered an order confirming the Plan [DE 2376].
12 Pecos filed no objection to Plan confirmation, and the Plan is effective and binding, as no
13 stay has been entered pending appeal.

14 Under the Plan, “any and all Claims of Non-Debtor Insiders against USACM” are
15 “Subordinated Claims.”¹ “Non-Debtor Insiders” are defined as any Insider that is not a
16 Debtor, and expressly includes, without limitation, the IP Parties, any Affiliate of the
17 Debtors and the IP Parties, and Insiders of the IP Parties.² The “IP Parties” are defined to
18 mean Joseph Milanowski, Thomas Hantges, Paul Hamilton, and USA Investment Partners,
19 LLC (“USAIP”).³ “Insider” includes any partnership in which the person is a general
20 partner, or corporation of which the person is a director, officer, or person in control.⁴

21 Under the Plan, all payment to holders of Allowed Subordinated Claims is
22 subordinated to the payment in full, plus interest, of all Allowed Penalty Claims, which in
23 turn are subordinated to the payment in full, plus interest, of all Allowed General
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¹ Plan § 1.A.126.
² Plan § 1.A.99.
³ Plan § 1.A.92.
⁴ Plan § 1.A.88.

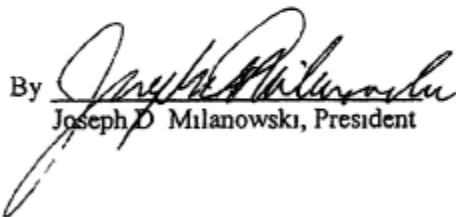
Unsecured Claims.⁵ The Plan explains that no distribution to holders of Allowed Subordinated Claims is anticipated.⁶

B. Pecos and Its Claim

Pecos filed Proof of Claim No. 751-2, which asserted an unsecured claim for \$470,080.98 arising out of an unexpired lease it entered into with USACM (the “Pecos Lease”).⁷ A copy of the Pecos Lease is attached to Proof of Claim No. 751-2.⁸ The signature block for the Pecos Lease is signed for Pecos by Thomas A. Hantges, President of USA Development, Inc. as General Partner for Pecos:⁹ (SOF ¶ 5.)

TENANT:

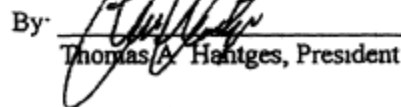
USA Commercial Mortgage Company

By 
Joseph D. Milanowski, President

LANDLORD:

Pecos Professional Park Limited Partnership

By USA Development, Inc., a Nevada corporation, General Partner

By 
Thomas A. Hantges, President

Pecos is a limited partnership organized under Nevada law.¹⁰ Nevada public records confirm that one of Pecos’ general partners is USA Development, Inc.¹¹ Nevada public records show that USA Development, Inc. in turn is controlled by Hantges, as president and secretary.¹²

III. THE PECOS CLAIM IS A SUBORDINATED CLAIM

Rule 56 of the Federal Rules of Civil Procedure, made applicable here by Bankruptcy Rules 9014(c) and 7056, mandates entry of summary judgment where the moving party demonstrates the absence of a genuine issue of material fact and entitlement

⁵ Plan § II.C.1.g.

⁶ *Id.*

⁷ SOF ¶ 1.

⁸ SOF ¶ 1.

⁹ SOF ¶ 1.

¹⁰ SOF ¶ 2.

¹¹ SOF ¶ 2.

¹² SOF ¶ 3.

1 to judgment as a matter of law.¹³ Once the USACM Trust moves for summary judgment
2 the burden shifts to Pecos to present specific facts and law showing that there is a genuine
3 issue for trial.¹⁴

4 The public records and the Pecos Lease demonstrate that Pecos is a “Non-Debtor
5 Insider” as defined by the Plan because it is controlled by Thomas Hantges as the
6 president of USA Development, Inc.¹⁵ Accordingly, the Pecos Claim is classified as a
7 member of Class A-7, Subordinated Claims under the terms of the Plan and should be
8 reclassified by the Court accordingly.¹⁶

9 **IV. CONCLUSION**

10 The USACM Trust asks that the Court grant this motion for summary judgment
11 and, consequently, sustain the Objection, reclassify the Pecos Claim as a Class A-7
12 Subordinated Claim under the Plan, and grant any other relief the Court considers just and
13 proper.

14 Dated October 29, 2007.

15 **LEWIS AND ROCA LLP**

16
17 By /s/ RC (#006593)

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26 ¹³ FED. R. CIV. P. 56(c); FED. R. BANK. P. 7056; *Celotex Corp. v. Catrett*, 477 U.S. 317,
322 (1986).

27 ¹⁴ *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1055-56 (9th Cir. 2002).

28 ¹⁵ See Section II.A, above.

¹⁶ Plan § II.C.1.g.

1 Copy of the foregoing served on October 29, 2007, via email where an email address is
2 listed, and if no email address is listed, then by first class mail, postage paid, addressed to:

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